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No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

vs.

THE STATE OF SOUTH DAKOTA,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

Statement of Interest

The State of California is vitally concerned with the outcome of the case at bar and strongly supports Petitioners' position that under the plain language of 26 U.S.C. § 3309(b)(1), the exemption provided therein is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. The State of California further contends that under that criteria the South Dakota Supreme Court's decision is in error in holding that section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), requires church elementary and secondary school employees to be covered under state unemployment compensation laws. The South Dakota Court's decision adopted the 1978 interpretation of the Secretary of Labor ("Secretary") of section 3309 — an inter-

pretation with which the State of California strongly disagrees.[1]

Conformity proceedings under 26 U.S.C. §§ 3304 and 3310 were instituted against the State of California and nine other states for the year ended October 31, 1980. Although the proceedings were suspended as to California and seven of the other nine states for the year ended October 31, 1980, the Secretary expressly reserved the right to recommence the proceedings for the year ending October 31, 1981. (45 Federal Register 74796.) The results of non-conformity are indeed staggering. If the State of California was held to be out of conformity with FUTA, in excess of one billion dollars would be lost in the first year alone by California employers due to the elimination of the offsetting credit against the federal unemployment tax and by the State of California due to the elimination of reimbursement of administrative costs from the federal government.

Unquestionably, an interpretation of law such as the Secretary's, which has such tremendous implications must be closely scrutinized. The analysis must go beyond the South Dakota Court's cursory review. It is the State of California's position that such an analysis must result in rejection of the Secretary's interpretation and reversal of the decision of the South Dakota Supreme Court.

This brief is being filed by the State of California Attorney General pursuant to United States Supreme Court Rule 36.4.

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[1]The State of California supports the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama & Nevada v. Marshall* (5th Cir. 1980) 626 F.2d 366. The Fifth Circuit's decision rejected the Secretary's 1978 interpretation and is directly contrary to the South Dakota Court's decision. A Petition for a Writ of Certiorari to this Honorable Court has been filed in the Fifth Circuit case (Docket No. 80-922). The State of California has joined with seven other states in urging this Honorable Court to grant the Petition for a Writ of Certiorari in the Fifth Circuit case and to grant the motion of Alabama and Nevada for consolidation with the case at bar.

Summary of Argument

The South Dakota Supreme Court's decision in the case at bar is incorrect. It ignores important issues, places excessive emphasis on an isolated statistic in a Senate Report and gives unwarranted deference to the Secretary's 1978 interpretation of the law.

The Secretary's 1978 interpretation of 26 U.S.C. § 3309(b) is entitled to no deference in that it is not a contemporaneous interpretation, it is inconsistent with the Secretary's actual contemporaneous interpretations and it is to this day inconsistent with current interpretations espoused by the Secretary.

The sections of FUTA must be interpreted according to their plain language unless a *clear* contrary legislative intention is shown. The plain language of 26 U.S.C. § 3309(b)(1) indicates that the exemption provided thereunder is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. The reference to a bare statistic in a Senate Report unsupported by any background data or explanation in that report does not provide a clear contrary legislative intent.

The South Dakota decision does not discuss whether 26 U.S.C. § 3309(b)(1)*(A)* is applicable. Only 26 U.S.C. § 3309(b)(1)*(B)* is discussed. The South Dakota decision does not recognize that the South Dakota counterpart to 26 U.S.C. § 3309(b)(3) (prior to the 1976 amendments), SDCL 61-1-10.4(3), was not identical to its FUTA counterpart. Finally, although FUTA demands an inquiry into whether the common law employer-employee relationship exists for purposes of the exemption provided in 26 U.S.C. § 3309(b)(1), the South Dakota decision fails to discuss this issue at all.

ARGUMENT

I

The Secretary's 1978 Interpretation Is Entitled to No Deference

The interpretation which is the cause of the litigation in the case at bar as well as nationwide litigation and the conformity proceedings is the Secretary's 1978 interpretation of the deletion of 26 U.S.C. § 3309(b)(3) under the 1976 amendments to FUTA. That interpretation was embodied in two documents in 1978 — the Bishop Kelly letter (April 18, 1978) (see Opn. at 290 N.W.2d 845, 847) and Unemployment Insurance Program letter No. 39-78 (May 30, 1978) (see Joint Appen., p. A-40). In essence, as set forth in those documents, the Secretary's position in 1978 was that 26 U.S.C. § 3309 (b)(1)(B) had no application to church-related schools and 26 U.S.C. § 3309(b)(1)(A) applied only to those "strictly church duties" performed for more than fifty percent of the pay period by church employees at the church-related schools pursuant to their church responsibilities. Dismissing for the moment the erroneous nature of said interpretation, we urge this Honorable Court to note the following important facts which demonstrate that the Secretary's 1978 interpretation is entitled to *no* deference.

First, contrary to the statements of the South Dakota Supreme Court at 290 N.W.2d 845, 849, the Secretary's 1978 interpretation was not the same position the Department of Labor ("the Department") took immediately after Public Law 94-566 (the 1976 amendments to FUTA) was passed. The 1978 interpretation was not a contemporaneous interpretation of the 1976 amendments and was inconsistent with the actual contemporaneous interpretations of the Department.

On December 7, 1976, the Department issued a memorandum to all states entitled Supplement No. 1 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566*. In this memorandum, the following question and answer appeared:

> "*Question*:
>
> "Do the 1976 amendments affect church-related schools?
>
> "*Answer*:
>
> "Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b)(1), (2) . . . are still applicable . . . *For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1)*." (See Petitioners' Petn. Appen. E, pp. A62-A63.) (Emphasis added.)

Therefore, in its most contemporaneous statement concerning the 1976 amendments to FUTA, the Department affirmed the applicability of the "optional" exemption provisions of 26 U.S.C. § 3309(b)(1) to church-related schools.

On February 2, 1977, the Department issued a second memorandum to the states entitled Supplement No. 2 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566*. This memorandum was intended to explain the criteria for determining the aforementioned *conceded* applicability (in its December 7, 1976 memorandum) of 26 U.S.C. § 3309(b)(1) to church-related schools. In pertinent part, it provided:

> "Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. *If the workers are employed by a church,*

their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

"The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

"The changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B)." (See Petitioners' Petn. Appen. F, pp. A64-A67.) (Emphasis added.)

Clearly, the Department's actual contemporaneous interpretations of the 1976 amendments to FUTA recognized that the exemption provisions of 26 U.S.C. § 3309(b)(1) continued to apply to church-related schools and that the crucial inquiry was to factually determine who or what was the "employing organization" of the employees in question. If the "employing organization" was a church, the exemption under (b)(1)(A) applied. If the "employing organization" was other than a church, then the two-part inquiry under (b)(1)(B) had to be conducted. It cannot be overemphasized that these contemporaneous interpretations are completely contrary to the Secretary's 1978 interpretations.

To further emphasize the lack of consistency of the Secretary's interpretations and/or positions, this Honorable Court should be made aware of the fact that the Secretary has recently espoused a "new" position in the trial court proceedings in *Grace Brethren, et al. v. State of California, et al.*, Case No. 79-093-MRP, USDC (C.D. Cal.) and *Lu-*

theran Church-Missouri Synod, et al. v. State of California, et al., Case No. 79-162-MRP, USDC (C.D. Cal.).

The "new" position of the Secretary was put forth at trial in oral argument. The "new" position is that *no teacher* other than ministers as defined in the statute, could ever be exempt under 26 U.S.C. § 3309(b) although some clerical personnel could be exempt. (R.T., pp. 127-129, of proceedings on Aug. 12, 1980; See Appendix.) *Nowhere* in the Bishop Kelly letter or Unemployment Insurance Letter No. 39-78 is such a statement found. *No distinction* is made in the 1978 interpretations between clerical personnel employed by the church and teachers employed by the church. Although this "new" position may be nothing more than a "litigating position", it is instructive in that it demonstrates the total lack of consistency of the Secretary's interpretations of FUTA.

From the above, it is evident upon several grounds that the Secretary's 1978 interpretation in question herein is not entitled to any deference. First, it is not a contemporaneous construction of FUTA. (See *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 142). Second, the interpretation has not remained consistent with earlier *or* later pronouncements of the Secretary. (*Id.*, at 142.) Finally, the interpretation contradicts the plain language of 26 U.S.C. § 3309(b)(1) and lacks any support from the pertinent legislative history. (*Id.*, at 145; *Hart v. McLucas* (9th Cir. 1976) 535 F.2d 516, 520.)

In all, it is obvious that this Honorable Court should accord *no* deference to the Secretary's 1978 interpretation. Since the South Dakota Supreme Court erroneously placed great emphasis on that interpretation, this Honorable Court should reverse that Court's decision as well.

II

No Clear Congressional Intention to the Contrary, the Plain Language of 26 U.S.C. § 3309(b)(1) Is Controlling

It is a familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a *clearly* expressed legislative intention to the contrary that language must ordinarily be regarded as conclusive. (*Consumer Product Safety Commission v. GTE Sylvania, Inc.* (1980) .... U.S. .... , 100 S.Ct. 2051, 2056; *United States v. Apfelbaum* (1980) .... U.S. .... , 100 S.Ct. 948, 952; *States of Alabama & Nevada v. Marshall, supra*, 626 F.2d 366, 368-9; see also *NLRB v. Catholic Bishop* (1979) 440 U.S. 490, 504-507. If a statute is plain and unambiguous on its face, there is no need for the Court to refer to the legislative history as a guide to its meaning. (*TVA v. Hill* (1978) 437 U.S. 153, 184, fn. 29; *Ex Parte Collett* (1949) 337 U.S. 55, 61; see also *Caminetti v. United States* (1917) 242 U.S. 470, 485.)

The plain and unambiguous language of 26 U.S.C. § 3309(b)(1)[2] indicates that the exemption provided thereunder is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. *States of Alabama & Nevada v. Marshall, supra*, 626 F.2d 366, 369. If the employer is a church or convention or association of churches, the exemption under 26 U.S.C. § 3309(b)(1)(A) applies regardless of the type of services

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[2]26 U.S.C. § 3309(b)(1) provides:

(b) Section not to apply to certain service. — This section shall not apply to service performed —

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; . . .

performed. If the employer is an organization operated primarily for religious purposes which is operated, supervised, controlled or principally supported by a church or convention or association of churches, the exemption under 26 U.S.C. § 3309(b)(1)(B) applies, again regardless of the type of services performed.

The term "employer" is defined in FUTA as to include "any person who . . . paid wages . . . ." (26 U.S.C. § 3306(a)(1)(A).) The term "employee" is defined in 26 U.S.C. § 3121(d)(2) (which section is expressly made applicable to FUTA by 26 U.S.C. § 3306(i)) to include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 C.F.R. § 31.3121(d)-1(c)(2) (1979) explains that an employer-employee relationship exists when the employer has the right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. The above definitions show that the concept of "employment" and the phrase "in the employ of", as used in 26 U.S.C. § 3309(b)(1), were intended to have their commonly understood, common law meaning under FUTA. Therefore, if the church or religious organization (under (b)(1)(B)) would be understood to be, under common law, the employer of the individuals in question then *all* services of such individuals would be exempt under 26 U.S.C. § 3309(b)(1).

It is clear that if Congress wanted to exempt only particular types of services of otherwise exempt employees it knew how to draft such language. The remaining permissible exemptions contained in 26 U.S.C. § 3309(b) demonstrate that point. The present subsections (b)(3), (b)(4) and (b)(5) of 26 U.S.C. § 3309 provide as follows:

"(3) in the employ of governmental entity referred to in paragraph (7) of section 3306(c), *if such service is performed by an individual in the exercise of his duties* —

"(A) as an elected official;

"(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

"(C) as a member of the State National Guard or Air National Guard;

"(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency; or

"(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

"(4) *in a facility* conducted for the purpose of carrying out a program of —

"(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

"(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

"(5) *as part of* an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; . . ." (Emphasis added.)

In these subsections, Congress spoke of services in the exercise of "duties as", services "in a facility", and services "as part of . . . [a] program". Subsection (b)(3) is particularly enlightening because Congress qualified its initial words "in the employ of" with the words "if such service is performed by an individual in the exercise of his duties — as . . . ." Clearly, if the Secretary's 1978 interpretation was correct, Congress could have qualified subsection (b)(1) similarly. As no such qualification appears in that latter subsection, it would appear that Congress never intended the meaning the secretary seeks to impute thereto.

In this connection, it is important to note that the 1970 House of Representatives Report which accompanied the adoption of 26 U.S.C. § 3309(b)(1) supports the above and states that the focus is on who is the employer and not on what duties are performed by the employee. (See H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969).)

From the foregoing, it is readily apparent that the language of 26 U.S.C. § 3309(b)(1) is plain and unambiguous on its face. Therefore, unless there is a *clearly* expressed legislative intention to the contrary the language of the statute is controlling.

In rendering its decision, the Supreme Court of South Dakota relied heavily upon the bare statistic found in a statistical table in the Senate Report which accompanied the 1976 amendments of the estimated number of employees (242,000) of nonprofit organizations to be added to coverage under P.L. 94-566. (See Sen. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976).) This isolated statistic can only have limited value because nowhere in the legislative history is there an explanation of its origins, how it was developed or what employees it included, no showing of any background data and no evidence of any Congressional understanding of the alleged significance of the figure. Surely,

the inclusion of the bare statistic in the Senate Report without explanation is not a clearly expressed legislative intention that contrary to the plain and unambiguous language of 26 U.S.C. § 3309(b)(1), employees of churches performing services in church-related elementary and secondary schools were not to be exempt under FUTA.

Furthermore, apart from the limited value such a statistic can have, a careful analysis of the 242,000 figure reveals that it does not prove that which the South Dakota Court thought it did. The South Dakota Court cites as support for its conclusions the Census Bureau's Statistical Abstract of the United States (1977 ed.). Table 237 at page 147 of that publication indicates that there were 261,000 *classroom teachers* in nonpublic elementary and secondary schools in 1975. This figure exceeds by 19,000 the figure used in the Senate Report. Moreover, it must be noted that the 261,000 only includes *classroom teachers*. It does not include such employees as principals, secretaries, nurses, counselors, bus drivers, cafeteria workers, or custodians as well as part-time and substitute teachers. The South Dakota Court's analysis either ignores this point or merely never considered it. Nevertheless, its analysis is insufficient and must be rejected.[3]

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[3]Moreover, to further question the South Dakota Court's heavy reliance upon this isolated figure as a "clear" indication of Congressional intent, it is certainly just as plausible that Congress was cognizant of the national problem in the mid-1970's, definitely present in California, of increasing lay-offs in public elementary and secondary schools of public school employees due to the combination of diminishing availability of public funds and declining enrollments. It could also be concluded that coverage of private schools was not the major factor affecting Congressional intent. In addition, it is reasonable to assume that Congress was aware that not only full-time classroom teachers, but also other school employees were likely to be laid off and therefore to benefit from Congress' extension of coverage.

As other examples are surely possible, it becomes readily apparent that the South Dakota Court's reliance upon the isolated 242,000 figure as a clear indication of Congressional intent was misplaced.

Accordingly, it is obvious that the isolated tabular figure of 242,000 is not a clear expression of contrary Congressional intent. Consequently, the plain language of 26 U.S.C. § 3309(b)(1) is controlling.

III

The South Dakota Decision Did Not Consider Major Issues Necessary to Decide This Case.

The decision of the South Dakota Supreme Court did not discuss three major issues which should be considered by this Honorable Court.

First, although the dissent notes at 290 N.W.2d 845, 854, that petitioner St. Martin Evangelical Lutheran Church is not a separate entity from St. Martin Evangelical Lutheran School and that it operates said school, no discussion is made by the majority of the applicability of 26 U.S.C. § 3309(b)(1)(*A*). Only 26 U.S.C. § 3309(b)(1)(*B*) is discussed. In light of the previous discussion regarding who is the employer, such an omission further mandates reversal of the decision.

Second, it should be noted that South Dakota law prior to the 1976 amendments differed in a material manner from the provisions of FUTA. Prior to 1976, SDCL 61-1-10.4(3) provided an exemption for services performed "in the employ of a school other than a *state* school which is not an institution of higher education." (Emphasis added.) Prior to 1976, 26 U.S.C. § 3309(b)(3) read the same as above except that the word "state" was omitted.[4] This difference in the laws does not save the South Dakota decision. The statistical analysis which appears in the decision, which has been shown to have very limited value, *supra*, would seem

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[4]California Unemployment Insurance Code section 634.5(c) likewise omitted the word "state".

to have even less significance as to South Dakota's law. There is no evidence, with respect to the statistical analysis, that Congress was aware of the fact the exemption contained in the prior South Dakota statute was significantly *narrower* than the exemption contained in FUTA and that the deletion thereof would result in significantly *fewer* employees being added to coverage under South Dakota law than would be added under FUTA (or under laws of states such as California). Although the South Dakota Court never addressed this difference, this Honorable Court should be cognizant of that fact.

Finally, although FUTA unquestionably requires an inquiry into whether the common law employer-employee relationship existed with respect to the petitioners in the case at bar, the South Dakota decision does not discuss the issue. In light of the previous discussion of the plain language of FUTA, the lack of such discussion in its opinion further demonstrates that the South Dakota Court's decision should be reversed.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Honorable Court reverse the decision of the South Dakota Supreme Court.

Respectfully submitted,

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APPENDIX

THE COURT: All right. Let's take this time to explore one or two questions here.

I have been considering at the break your position this morning, Mr. Sheinfeld, and now I want to ask you, if you will, just let's see if we can pursue this a little bit further.

The position of the Secretary has been and is, and you correct me if I am wrong, that no schools, no school employees are within the exemption or the exclusion.

MR. SHEINFELD: That is a correct statement of the position.

THE COURT: So that if, as in the testimony that we had today, a teacher is engaged in teaching the Bible, which is where I started with the hypothetical this morning — I gave you a hypothetical in which what I was thinking was that for the seven periods a day or six periods a day that that teacher taught, that teacher taught the Bible or taught moral instruction. Now, that teacher is not excluded?

MR. SHEINFELD: Unless that teacher is a minister as defined in the statute, no, he is not excluded, your Honor.

THE COURT: And it wouldn't make any difference whether that teacher worked for the church or worked for an organization which is dominated by a church?

MR. SHEINFELD: No, it would not, your Honor.

THE COURT: All right. Now then, let me ask you: What is it that you understand, what kind of an examination of the records of a school like this should be done by the state auditors to determine how much of the time is exempt and how much of it is not exempt?

MR. SHEINFELD: With respect to the teachers, none, your Honor.

THE COURT: So that when they go in to audit a school, what they should be asking first is: "How many ministers do you have on your teaching staff?" If the person were a minister, then you would say there would be a possibility of exemption, wouldn't you?

MR. SHEINFELD: There is an exemption for ministers, your Honor, yes.

THE COURT: Yes, if they can establish that they are a minister. When I say "possibility," what I mean is that they'd have to establish factually that they were a minister.

MR. SHEINFELD: Yes, that is true.

THE COURT: All right. Now, what else? Is there anybody else on the staff who would be excluded?

MR. SHEINFELD: Well, beyond the teachers there I suppose there are support personnel. There may be secretaries, other clerical people, nurses perhaps.

THE COURT: They would be exempt because they are in the employ of a church; is that right?

MR. SHEINFELD: Excuse me, your Honor. I didn't hear you.

THE COURT: They would be exempt because they are in the employ of a church?

MR. SHEINFELD: Not, your Honor, to the extent that they are — their activities, their work activities are in the furtherance of the school function.

THE COURT: So what would you be asking about those secretaries, taking that hypothetical? Let me put it this way: If they are sending out church bulletins even though they are located in the area of the school, that part of their time you would say is exempt?

MR. SHEINFELD: Yes, your Honor, I would.

THE COURT: And yet, you would not say that the teacher who teaches a Bible study is exempt?

MR. SHEINFELD: Not as part of the regular school curriculum, no.

THE COURT: Now even you must see just how preposterous that is.

MR. SHEINFELD: Your Honor, it is difficult, yes.

THE COURT: Mr. Sheinfeld, I don't want to put you in a box. I'm just telling you that it is inconceivable that you could have an employee — or doesn't it seem to ....